

3802

From: GARY HUDIBURGH
To: bernita
Date: 7/2/98 7:26am
Subject: What's New Page

Bernita -

Attached is an electronic copy of a memo signed by Mike Cook and Kenneth Konz. Paul has asked that we get this up on the internet ASAP (what's new page). We should also include this in the enhanced public access submission. Please let me know if I need to do anything else.

Thanks.

Hudi

CC: paulb

7-6-98

Keelley -

not sure where this
fits into the
grand scheme -

Didn't see this on
orig. list

June 30, 1998

3802

MEMORANDUM

SUBJECT: Review Standards for Construction Grants Audits, Management
Decisions, and Dispute Resolution

FROM: Michael B. Cook, Director /s/ Michael B. Cook
Office of Wastewater Management

Kenneth A. Konz /s/ Kenneth A. Konz
Assistant Inspector General for Audit

TO: Regional Administrators
Regions 1-10

Divisional Inspectors General for Audit

PURPOSE

The purpose of this memorandum is to call your attention to Congressional Committee report language regarding the standards of review in the construction grant program audit and dispute resolution processes, and to provide you with guidance on the review standards to be used.

BACKGROUND

The House Appropriations Committee, on page 74 of House Report 105-175, a report accompanying the Environmental Protection Agency's (EPA) fiscal 1998 appropriations act, states:

The Committee is aware of a continuing problem with the administration of the Clean Water Act's construction grant audit process, and therefore directs the Agency to uphold all project cost eligibility determinations for EPA grants that are supported by a decision document of the EPA or a designated state agency. Such decision documents include, but are not limited to, approvals of plans and specifications, engineering and

construction contracts, grant payments, change orders, subagreement eligibility decisions, or similar documents approving project cost eligibility. Such project cost eligibility determinations may be

reversed only upon a showing by the Agency that the original decision was arbitrary, capricious, or an abuse of the law at the time of the decision. The Committee notes that the intent of this language shall apply to current and future appeals.

In addition, the introduction to the Joint Explanatory Statement of the Committee of Conference for the fiscal 1998 appropriations act states:

Report language included by the House which is not changed by the Senate or the conference . . . is approved by the committee of conference.

We interpret the above-referenced legislative history to be consistent with Section 203(a)(2) of the Clean Water Act. In Section 203(a)(2)(A), which was enacted in 1987, Congress stated that, before taking final action on any plans, specifications, and estimates submitted after April 5, 1987, the Administrator shall enter into a written agreement which establishes and specifies which items of the proposed project are eligible for Federal payments under Section 203. The Administrator may not later modify such eligibility determinations unless they are found to have been made in violation of applicable Federal statutes and regulations. However, in Section 203(a)(2)(B), Congress limited the effect of subsection (A) by stating that eligibility determinations under Section 203(a):

...shall not preclude the Administrator from auditing a project pursuant to [Section 501], or other authority, or from withholding or recovering Federal funds for costs which are found to be unreasonable, unsupported by adequate documentation, or otherwise unallowable under applicable Federal cost principles, or which are incurred on a project which fails to meet the design specifications or effluent limitations contained in the grant agreement and permit pursuant to [Section 402] for such project.

Thus, even as it provided for greater predictability in eligibility determinations, Congress stopped short of limiting EPA's audit responsibilities and, instead, chose to ratify, in statute, the cost eligibility standards traditionally used in the program.

The above-referenced legislative history does not change the statutory provisions regarding audits and eligibility determinations. In light of the precise language of Section 203(a)(2)(B), we believe the House Appropriations Committee was urging EPA to expedite and streamline the audit and dispute resolution processes, consistent with EPA's existing policy of giving great weight to contemporaneous management decisions, as expressed in EPA Audit

Incurred After Contract Completion Date.

GUIDANCE

ARB Decision 13/14, dated February 24, 1984, deals with eligibility determinations in general. The decision stated, in pertinent part, the following principles for determining eligibility:

2. Evidence of affirmative management decisions by EPA or a delegated State on the specific item questioned by audit should carry great weight in the decision whether to allow the relevant questioned costs.
3. Evidence of affirmative action is an insufficient basis on which to allow costs questioned by audit if the action was demonstrably:
 - a. Outside the limits of managerial discretion, including actions that are arbitrary and unreasonable; and/or
 - b. In violation of nondiscretionary standards in existence at the time of the administrative approval.

The October 1, 1990, memorandum provides guidance for determining the eligibility of engineering costs incurred after the construction contract completion date. The memorandum restates EPA's longstanding policy that project inspection costs incurred after the scheduled contract completion date are allowable, provided that the grantee can demonstrate that: (1) the costs were not incurred as a result of grantee mismanagement or contractor failure to perform, but rather were attributable to justifiable extensions to the time of performance; and (2) the costs were otherwise reasonable, necessary, and allocable to the project. With respect to justifications for time extensions in cases where a change order was contemporaneously approved, the memorandum states, at page 4:

Great weight should be assigned to contemporaneous change orders approved by a delegated state, the CoE [Corps of Engineers], or an EPA project officer (any of which is hereafter referred to as project officer approval), where the file reveals the project officer conceptually adhered to the Change Order Guide by taking a

hard look at the need for a contract time extension and whether costs claimed were reasonable and necessary. For example, if there is evidence in the project file showing that the project officer carefully considered: the need for the time extension; the length of the extension and the allowability of A/E [architect/ engineering] fees and other expenses associated with the extension then such contemporaneous project officer approvals should not be second guessed. Therefore, change orders with this support should be dispositive unless there is

strong evidence to the contrary.

In *Northeast Ohio Regional Sewer District, Ohio*, AA-90-AD14 (Assistant Administrator's Decision issued June 11, 1994) we stated that a hard look is characterized by the following three elements:

The first element of a hard look is whether the project file indicates that the request for a change order was explicitly considered. . . . The second element of a hard look is whether the [reviewing agency] possessed reliable information on which to base a review of the request. . . . The third element of a hard look is whether the request was subjected to critical review. *Id.* at 7-8.

If a contemporaneous determination of eligibility involving engineering costs incurred after the construction contract completion date meets the three-pronged test for a hard look, it should be considered dispositive.

In summary, EPA's longstanding policy in this area is to give great weight to contemporaneous eligibility determinations. Previous EPA and state eligibility determinations should be reversed in the audit and dispute resolution processes only when those determinations misapplied or disregarded applicable statutory or regulatory requirements. The contemporaneous decisions are entitled to a presumption of regularity and should not be questioned unless the record (or other information known to the Agency) provides evidence that statutory or regulatory requirements were misapplied or disregarded. We believe that a fair and consistent application of this longstanding policy regarding eligibility determinations will implement the Committee's intent expressed in the above-referenced legislative history and insure compliance with Section 203(a)(2).

Our examination of petitions for the Assistant Administrator's discretionary review indicates that the Regions may vary in the degree of weight that is accorded to

contemporaneous eligibility determinations. This variability may result in inconsistent treatment of assistance recipients, additional appeals to the Assistant Administrator, and additional time, workload, and cost in settling disputes. The current dispute resolution process was originally adopted to foster the speedy resolution of assistance disputes at the lowest possible level. Fair and consistent Regional dispute decisions can contribute greatly to achieving this goal. Therefore, we request that you share this guidance with all your staff involved in the audit and dispute resolution processes. Please take all necessary steps to assure that this guidance is applied throughout the audit and dispute resolution processes.

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